Deonny ak Ugoh & Anor v Public Prosecutor

HIGH COURT (SIBU) — CRIMINAL APPEAL NO 42–11 OF 1998
TEE AH SING J
7 JANUARY 1999

Criminal Procedure *— Plea of guilty — Qualified plea — Material to be considered in deciding whether plea of guilty is unqualified — Whether statement in such material must be made under oath*

Evidence *— Documentary evidence — Document used to decide whether plea of guilty is unqualified — Whether statement made in the document must be made under oath*

The appellants pleaded guilty to the charges preferred against them but claimed in the probation officer's reports that they were under the influence of alcohol at the time of the commission of the alleged offence. The Sessions Court judge, Sibu convicted them accordingly. The appellants appealed. The learned deputy public prosecutor submitted, inter alia, as follows: (i) the pleas of guilty of the appellants were unequivocal and unqualified and the requirements under s 173(b) of the Criminal Procedure Code (FMS Cap 6) have been complied with; and (ii) since the probation officer's reports were not made upon evidence under oath, the allegation of drunkenness must be proved by the appellants.

Held, setting aside the conviction and sentence:

(1) Evidence under oath was not required in a case where an accused pleaded guilty. Since there was allegation of drunkenness as stated in the respective probation reports, it was the duty of the learned sessions court judge to take the allegation into account in deciding whether the pleas of guilty were qualified or not (see p 472H).

(2) The learned sessions court judge should have rejected their pleas of guilty as their pleas did not constitute an unequivocal plea of guilty (see p 472I); *PP v Cheah Chooi Chuan* [1972] 1 MLJ 215 followed.

[Bahasa Malaysia summary

Perayu-perayu telah mengaku salah kepada pertuduhan yang dibuat terhadap mereka tetapi mendakwa dalam laporan pegawai perunding cara bahawa mereka mabuk pada masa kesalahan yang dikatakan berlaku. Hakim Mahkamah Sesyen, Sibu telah menyabitkan mereka. Perayu-perayu membuat rayuan. Timbalan pendakwa raya yang arif berhujah, antara lain, seperti yang berikut: (i) rayuan bersalah perayu-perayu adalah jelas dan tanpa syarat dan keperluan di bawah s 173(b) Kanun Acara Jenayah (NMB Bab 6) telah dipatuhi; dan (ii) oleh kerana laporan pegawai perunding cara tidak dibuat atas keterangan bersumpah, pengataan kemabukan mestilah dibuktikan oleh perayu-perayu.

Diputuskan, mengetepikan sabitan dan hukuman:

(1) Keterangan bersumpah tidak diperlukan dalam kes mengaku bersalah. Memandangkan terdapat pengataan kemabukan seperti yang dinyatakan dalam laporan percubaan masing-masing, adalah merupakan kewajipan hakim mahkamah sesyen yang arif untuk mengambil kira pengataan tersebut dalam memutuskan sama ada akuan bersalah adalah bersyarat atau tidak (lihat ms 472H).

(2) Hakim mahkamah sesyen yang arif sepatutnya telah menolak akuan-akuan bersalah mereka kerana akuan-akuan tersebut tidak membentuk akuan bersalah yang jelas (lihat ms 472I); *PP v Cheah Chooi Chuan* [1972] 1 MLJ 215 diikut.]

Notes

For cases on qualified plea, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1789–1793.

For cases on documentary evidence generally, see 7 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 688–789.

Cases referred to

Lee Weng Tuck & Anor v PP [1989] 2 MLJ 143 (refd)
Mohammad bin Hassan v PP [1998] 5 MLJ 65 (refd)
Munandu v PP [1984] 2 MLJ 82 (refd)
PP v Cheah Chooi Chuan [1972] 1 MLJ 215 (folld)
Teo Siew Peng & Ors v PP [1985] 2 MLJ 125 (refd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 173(b)
Evidence Act 1950 ss 101, 103
Juvenile Courts Act 1947 s 21(3), (4), (5)
Penal Code (FMS Cap 45) ss 34, 85, 86, 394

Michael Tiang (*Wong Orlando Chua & Co*) for the appellants.
Awang Armadajaya bin Awang Mahmud (Deputy Public Prosecutor) for the respondent.

Cur Adv Vult

Tee Ah Sing J: The first appellant and the second appellant ('the appellants') were convicted and sentenced to three years imprisonment and fined RM3,000 in default three months' imprisonment each by the Sessions Court judge, Sibu on a charge under s 394 of the Penal Code (FMS Cap 45) read with s 34 of the Penal Code. They had filed an appeal against conviction and sentence. On the hearing of the appeal, the learned counsel for the appellants urged this court to act in revision to hear the appeal against the conviction and sentence. In support, the case of *Mohammad bin Hassan v PP* [1998] 5 MLJ 65 was cited.

A Learned counsel for the appellants in his written submission contended, inter alia, as follows:

(1) The provisions of s 173(b) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') has been considered by the Supreme Court in *Lee Weng Tuck & Anor v PP* [1989] 2 MLJ 143.

B In the present case, although the appellants had pleaded guilty by their own mouths, both of the appellants have also claimed in the probation officer's reports (at pp 13 and 15 of the appeal record) that they were under the influence of alcohol at the time of the commission of the alleged offence. These remarks made by the appellants in the C said probation officer's reports after their guilty pleas have shown that the appellants had actually failed to fully understand the nature and consequences of the charge to which they pleaded guilty, and the appellants did not intend to admit without qualification the offence alleged against them as required by s 173(b) of the CPC. In support, the case of *Munandu v PP* [1984] 2 MLJ 82 was cited.

D (2) Since the appellants are charged under s 394 of the Penal Code, the prosecution has to show that the appellants must have voluntarily caused hurt to the complainant.

The appellants have clearly claimed that they were under the influence of alcohol at the time of the commission of the offence E charged in their respective probation officer's reports.

It is also provided in ss 85 and 86 of the Penal Code that if a person charged at the time of the act complained of did not know that such act was wrong or did not know what he was doing and the person charged was by reason of intoxication insane, temporarily or F otherwise, at the time of such act, he would not be guilty of the offence since he has no specific intention at the time of such act. Therefore, it is very unsafe to hold the appellants, whilst under the influence of alcohol, had the specific mens rea to know or has reason to believe to be likely to cause hurt against the complainant so as to facilitate the commission of the alleged robbery.

G (3) There is not an iota of evidence to show that there was a pre-arranged plan or arrangement made by the appellants to commit the offence charged. Common intention of the appellants to commit the offence charged has not been proved.

(4) In respect of sentence, it was submitted that the sentence imposed was H manifestly harsh, excessive and unsuitable with regard to the circumstances and facts of the case. In support, the case of *Teo Siew Peng & Ors v PP* [1985] 2 MLJ 125 was cited.

The learned deputy public prosecutor ('the DPP') submitted, inter alia, as follows:

I (1) The plea of guilty of the appellants were unequivocal and unqualified and the requirements under s 173(b) of the CPC have been complied with.

(2) On the probation officer's reports, it was submitted that the purpose of the reports is to assist the court in compliance with s 21(3), (4) and (5) of the Juvenile Courts Act 1947. The reports were not made upon evidence under oath and therefore the allegation of drunkenness was not made under oath. Sections 101 and 103 of the Evidence Act 1950 imposes a duty on the appellants to prove a particular fact if they allege that fact to exist. Quite apart from the probation officer's report, there is no evidence for the learned sessions court judge to act upon to entitle the appellants to plead drunkenness as a defence or lack of mens rea.

(3) On the issue of common intention, it was submitted, that the brief facts as admitted by the appellants as correct clearly shows a concerted effort in tandem with each other and illustrates a consensus ad idem.

(4) The learned sessions court judge was entirely correct in accepting the plea of guilty of both appellants and convicting the appellants on their own plea.

(5) In respect of sentence, the learned DPP left it to the court.

The learned counsel for the appellants in reply submitted that there is a duty on the part of the learned sessions court judge to take adequate consideration any allegation or claim made by the appellants in the probation officer's reports which would render their pleas of guilty not unreserved, unqualified and unequivocal up to the time of sentencing.

I shall now deal with the matter before me.

Before sentence was passed, the learned sessions court judge had adjourned the case to enable probation reports to be prepared in respect of the appellants.

In the probation officer's report of the first appellant (at p 13 of the appeal record), it is stated that: 'He said that he committed this offence under the influence of alcohol.'

In the probation officer's report of the second appellant (at p 15 of the appeal record) it is stated that: 'At interview, the offender said that he was drunk, at the time of committing this offence.'

I reject the contention of the learned DPP that the appellants must adduce evidence under oath to support the allegation of drunkenness because evidence under oath is not required in a plead guilty case. Even the facts of the case tendered by the prosecution is not given under oath. Since there is allegation of drunkenness as stated in the respective probation reports, it was the duty of the learned sessions court judge to take the allegation into account in deciding whether the pleas of guilty were qualified or not.

The learned sessions court judge should have rejected their pleas of guilty as their pleas did not constitute an unequivocal plea of guilty. As was stated by Chang Min Tat J (as he then was) in *PP v Cheah Chooi Chuan*

A [1972] 1 MLJ 215 at p 215H. 'It is a cardinal principle of law that a plea of guilty must be completely unreserved, unqualified and unequivocal.'

On this ground alone, the conviction and sentence should be set aside. As such, I shall not deal with the other grounds of appeal.

In the case of *Mohammad bin Hassan v PP* [1998] 5 MLJ 65, His B Lordship Augustine Paul JC (as he then was) at p 75E–G said:

> In considering the proper order to be made, I bear in mind s 305 of the CPC which provides that a person who has been convicted on his plea of guilt is entitled to appeal only against the extent or legality of the sentence. However, once such an appeal has been lodged, there is nothing to prevent an appellant from contending at the hearing that the conviction is illegal and requesting the C court hearing the appeal to act in revision. The court is entitled to and will, where appropriate, act in revision and set aside a conviction (see *Lee Yu Fah & Ors v PP* [1937] MLJ 179) and *Mohd Dalhar bin Redzwan & Anor v Datuk Bandar, Dewan Bandaraya Kuala Lumpur* [1995] 1 MLJ 645 (CA)). Upon revision, the proper order for the High Court to make is to set aside the plea of guilty and substitute it with a plea of not guilty and send the case back to D the trial court (see *PP v Mohamed Termizi* [1985] 1 MLJ 219).

Acting in revision, I quash the conviction and sentence and remit the case to the Sessions Court at Sibu for trial. I also set aside the pleas of guilty and substitute them with pleas of not guilty and order the appellants to appear in the Sessions Court at Sibu on 15 January 1999 at 9am. I also order that E the fine, if paid, shall be refunded to the appellants and the exhibits to be returned to the police for necessary action.

Conviction and sentence set aside.

Reported by Loo Lai Mee

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